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Trump Action on Transgender Students Carries Contradictions

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Co-Mom Loses Out Due to State's Past Discrimination

Arizona didn't recognize her ex-marriage, allow second-parent adoption; now she's out in the cold

BY ARTHUR S. LEONARD

A state appellate panel in Arizona has affirmed a lower court ruling there that found that the 2015 US Supreme Court marriage equality ruling does not require that state to retroactively deem a woman the legal parent of children adopted by her wife at a time when Arizona did not recognize their marriage or allow second-parent adoptions.

The Court of Appeals of Arizona, on December 29, upheld Maricopa County Superior Court Judge Suzanne E. Cohen's decision in *Doty-Perez v. Doty-Perez*, with Judge Jon W. Thompson writing for the unanimous panel.

Susan and Tonya Doty-Perez began living together in October 2010. In July 2011, the women, while residents of Arizona, legally married in Iowa. After their marriage, they agreed that Tonya would adopt four special needs children from foster care, intending to raise the children together as co-parents. If Arizona had allowed for same-sex couples jointly to adopt children, they would have done so, but at that time, the state prohibited same-sex partner adoptions and did not recognize their Iowa marriage.

Susan alleges that on April 8, 2014, as their relationship was ending, she asked Tonya for consent to adopt the children through a second-parent (by then legal) or step-parent adoption, but Tonya refused. Susan moved out a few days later, and did not file a petition to adopt the children, which would have been futile without Tonya's consent. In October of that year, the Ninth Circuit Court of Appeals, whose jurisdiction includes Arizona, struck down same-sex marriage bans in several other states in that circuit and several days later a federal district court threw out Arizona's. The state decided not to appeal that decision.

At that point, Susan began divorce proceedings and sought visitation rights and later joint legal decision-making over the children.

After the nation's high court

issued its marriage equality ruling in the *Obergefell* case, Susan followed up with a motion to be recognized as a legal parent of the children.

Judge Cohen denied that petition, finding that although Susan had proven by a preponderance of the evidence that the two women would have jointly adopted the children had Arizona allowed such adoptions, Susan had failed to file a second-parent adoption request in October 2014 when Arizona came under an obligation to recognize the Iowa marriage and afford her the rights that she would have to seek to adopt her spouse's children, and that Tonya, the legal parent, had refused to consent to a step-parent adoption by Susan, as she had the right to do.

The appellate panel agreed with Tonya's argument that there was no support in Arizona case law for the concept of *de facto* parent, thus disposing of one of Susan's arguments out of hand. (The Maine Supreme Judicial Court issued a contrary opinion on the *de facto* parent issue just weeks later, on January 19, in *Thorndike v. Lisio*.)

"We find the dispositive issue is whether, as a matter of law, if a married person adopts a child, that person's spouse is also deemed or presumed to be a legal parent, with all the legal rights and obligations attached to that status, merely because the couple intended to adopt together," wrote Judge Thompson. "We think not."

The court did concede that, given *Obergefell*, Susan could argue that Arizona's failure to recognize the women's Iowa marriage or to allow legally-married same-sex couples to adopt at the time Tonya adopted the children was a violation of the 14th Amendment.

"However," wrote Thompson, "we do not read *Obergefell* to support Susan's paramount contention that the right of same-sex couples to marry and have their marriages recognized under the 14th Amendment of the US Constitution requires that states retroactively modify adoptions by individuals in same-sex marriages who would have jointly adopted, if they had been allowed to do so."

Under Arizona law, Thompson continued, there is no presumption "granting legal parental rights or obligations to a non-adoptive spouse merely because of her marriage to a person who has adopted a child... To be sure, in light of *Obergefell*, [the statute's] language that 'a husband and wife may jointly adopt' must be interpreted to also mean that 'a wife and wife' or 'husband and husband' may jointly adopt. However, the adoption statute's use of the permissive 'may' indicates there is no presumption of parentage for a non-adoptive spouse."

If the court were to find such a presumption, that would be contrary to the legislature's intent in passing the relevant statute, the panel held.

"Except in the case of biology, the only legal mechanism that may establish legal parenting status and attach the associated rights and obligations is an order of adop-

tion," Thompson wrote. "Thus, we cannot order legal parent status for Susan, despite the fact that the parties intended to adopt the children together, but did not only because it was legally impermissible at the time, and Tonya later refused to consent to Susan petitioning for adoption of the four children, prior to their divorce and after same-sex adoptions were legal in Arizona."

The court, Thompson asserted, was "without authority to confer legal parent status on Susan when she never actually petitioned the court to acquire that status *while she was still married to Tonya*. While we empathize with Susan because our holding leaves her without parental rights and obligations for four children she loves, provided and cared for, the relevant statutes do not support a contrary conclusion."

Susan could seek review from the Arizona Supreme Court.

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